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**Report on the Draft Common Frame of Reference: a report prepared
for the Scottish Government by Laura Macgregor, University of
Edinburgh, on the document known as ‘Principles, Definitions and
Model Rules of European Private Law’
26/09/08**

Prepared by Laura Macgregor¹ (“the Author”) for the Civil Law Division of the Scottish Government (“the Addressee”).

1 INTRODUCTORY

The proper name of the DCFR is “Principles, Definitions and Model Rules of European Private Law.” It is an academic initiative, the product of collaboration by distinguished private law scholars across Europe over a substantial period of time. Those authors have drawn on common approaches throughout Europe in order to frame the DCFR.² It is, in effect, the follow-up to the Principles of European Contract Law (“PECL”),³ although in scope the DCFR is significantly more extensive. In particular, the DCFR integrates existing European measures of a consumer protection nature, absent from PECL. The DCFR is the product of collaboration by two separate bodies: the Study Group on a European Civil Code (“the Study Group”) and the Research Group on EC Private Law (“the Acquis Group”).

2. ROLE AND NATURE

2.1 Role

The DCFR is a purely academic initiative. It has an existence independent of possible developments in the European political arena. Like PECL, the DCFR has already stimulated academic comment and will form the basis of courses in Universities within Europe and possibly beyond. Clearly, however, the authors envisage a wider use for the DCFR. Reference is made to its “toolbox” function. This phrase encapsulates the role of the DCFR as a body of uniform terms and concepts which can be used by European legislators in the preparation of European legislation in the future. The involvement of the Acquis Group is crucial in this context. This Group has analysed existing European contract legislation, which is fragmented, and contains many examples of inconsistent and inaccurate usages of language. The DCFR will therefore help to ensure that terms and concepts appearing in legislation in the European private law field in the future will be consistent and coherent.

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² This is stated in the Introduction, Interim Outline Edition, p12.

³ *Principles of European Contract Law*, prepared by the Commission on European Contract Law, chaired by O Lando, edited by O Lando and H Beale, published in three parts in 1995, 2000 and 2003.

It should be noted that the toolbox role extends to concepts in addition to terms. Terms mean little when considered in isolation from legal rules. Thus, the greater part of the DCFR is model rules rather than terms. Nevertheless, the DCFR does not constitute (and is not intended to constitute) a body of law ready and available for immediate enactment. It takes the form of “soft law”, or general rules and principles functioning principally as an inspiration for legislators, both European and national.

The authors clearly intend the DCFR to have a more significant role. It could constitute an “opt-in” instrument which parties could choose to govern their contracts. It could serve as a draft for drawing up a political Common Frame of Reference, called for by the European Commission’s “Action Plan on A More Coherent European Contract Law” of January 2003.⁴ In its present state, it is insufficiently sophisticated to fulfil either of these latter roles. It seems premature, therefore, to discuss the implications for Scots law were it enacted as law throughout Europe, possibly in the form of a European Civil Code.

2.2 “Dynamic” Nature

The existing published version⁵ of the DCFR contains bare rules. A further version containing “comments” and “notes” is due to be published by end 2008. The “comments” are explanatory comments written by the authors of the DCFR. The “notes” are national notes prepared by experts in each member state of the European Union, comparing the content of the DCFR with national law. This explains the title of the current edition: “interim outline edition.”

The DCFR is incomplete in other ways. Although it will eventually contain ten books, the current edition contains only seven,⁶ one of which is incomplete.⁷ One significant rule in the current edition is not yet finalised: the Acquis Group and the Study Group were unable to agree on whether the controls on unfair terms should apply to standard terms only (which have not been negotiated), or, additionally, to terms which have been negotiated. The existing edition contains both possibilities.⁸

Thus it can be seen that the DCFR is dynamic in nature. The style of numbering lends itself to the addition of further material. This report is prepared by reference to the existing interim outline edition only, without sight of the comments or national notes. Its content would require to be revised with the appearance of the full edition in late 2008.

2.3 Scope and content

The DCFR is divided into seven books: General Provisions (Book I); Contracts and other juridical acts (Book II); Obligations and corresponding rights (Book III); specific

⁴ COM (2003) final, OJ C 63/1

⁵ *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Interim Outline Edition*, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), edited by C Von Bar, E Clive, H Schulte-Nölke and H Beale, J Herre, P Schlechtriem, M Storme, S Swann, P Varul, A Veneziano, F Zoll, (Munich, Sellier: 2008).

⁶ For the titles of each book see 2.3.

⁷ Book IV, Specific contracts and rights and obligations arising from them.

⁸ DCFR II – 9:404.

contracts and the rights and obligations arising from them (Book IV); Benevolent intervention in another's affairs (Book V); Non-contractual liability arising out of damage caused to another (Book VI); and Unjustified enrichment (Book VIII).⁹ Clearly the DCFR extends beyond simply contract law. This report concentrates almost exclusively on the parts of the DCFR applicable to contract law, contained largely in Books II and III.

3 GENERAL CONCLUSIONS

3.1 The “mixed” nature of Scots law

Scots law is a “mixed” legal system, this phrase being used to describe its strong civil law base overlaid with the influence of English law. All other legal systems within the European Union are civilian in nature, except England which is part of the common law tradition. Thus, Scots law shares a civil law foundation with most of the member states of the European Union. After Union with England in 1707, the influence of English law dominated in Scotland. It would be wrong, however, to conclude that, following the Union, Scots law was entirely assimilated with English law. Rather, the mixed nature of Scots law is highly visible in the field of contract law. Modern Scots contract law contains concepts which are characteristic of civilian systems, for example, the Scottish third party right or *jus quaesitum tertio*, the unilateral promise or *pollicitatio*, and the adherence to specific performance rather than damages as the primary remedy for breach of contract.¹⁰ The existence of these civilian concepts not only sets Scots contract law apart from English law, but also aligns Scots law with its civilian neighbours in Europe.

The DCFR was produced by a group of academics drawn from both civilian and common law systems. In theory, at least, the DCFR is also “mixed” in nature, drawing inspiration from both the common law and the civil law. Scots law, as the only mixed legal system in Europe, is uniquely placed in its resemblance to the DCFR. Potentially, Scots law resembles the DCFR more than any other European member state resembles the DCFR. The civilian systems contain the concept of *causa*, which dictates that the obligations of both parties under a contract must have a purpose, reason or motive. Although *causa* was part of early law in Scotland, it has entirely disappeared from the modern law. The DCFR contains no concept of *causa*. In this respect, Scots law exhibits more similarities to the DCFR than any other civil law system exhibits to the DCFR.

Although English law contains no concept of *causa*, this does not lead to the conclusion that English law resembles the DCFR. The presence of the concept of “consideration” in English contract law¹¹ sets it apart from all other legal systems within the European Union, Scots law included. Not surprisingly, the DCFR contains no concept of consideration. There are other significant differences between English law on the one

⁹ The Books which are not yet available are: VIII Acquisition and loss of ownership in movables; IX Proprietary security rights in movable assets; and X Trusts.

¹⁰ The Scots term is “specific implement.” Specific performance is the term more widely used within Europe when discussing this remedy in the English language.

¹¹ The concept of consideration is difficult to define, although it could be said that it looks towards the balancing of obligations on both sides of the contractual relationship.

hand and the DCFR and Scots law on the other. English law contains no unilateral promise, its primary remedy for breach of contract is damages and not specific performance, and its third party right in contract is a relatively recent statutory innovation.¹²

There is even an argument that Scots law resembles the DCFR more than Scots law resembles English law. This conclusion can be supported by reference to the existence and role of the key concepts already identified: unilateral promise; third party rights and specific performance.

3.2 The undeveloped nature of Scots law

Scots law is, in comparison with many other European legal systems, under-developed. As a relatively small country, Scotland has a small body of case-law. The common law (as opposed to statute law) develops slowly, or sometimes not at all. It is difficult to find, often obscure and archaic. In certain areas, for example, the law of services,¹³ there is a paucity of analysis in Scots textbooks. In such cases there is, in fact, no law.

The DCFR, with its carefully worked-out regimes, represents an opportunity for Scots law. It offers a body of regulation which could be adopted by Scots law in part or in whole. The shared civil law foundation of Scots law and the DCFR mean that the DCFR rules are likely to operate well as “legal transplants.” Some of the DCFR provisions display a high degree of similarity to un-enacted recommendations of the Scottish Law Commission (“SLC”).¹⁴ This may be indicative of a similarity in thinking between law reformers in Scotland and the academic groups who produced the DCFR.

3.3 General conclusion

The general conclusion of this report is that the DCFR represents a welcome opportunity to develop Scots law in a manner that is consistent with the theoretical foundations of Scots law.

This report analyses the content of the DCFR under the following headings:

5. The DCFR: beneficial aspects from a Scots’ perspective;
6. The DCFR from a consumer’s perspective;
7. The DCFR from a business perspective.

As far as possible, the detail of the DCFR rules is contained in the Appendix to this report rather than the report itself.

4. GOOD FAITH IN CONTRACT LAW

¹² Introduced by the Contracts (Rights of Third Parties) Act 1999. The Scottish concept was developed by the leading Scottish jurist, James Dalrymple, Viscount Stair, in the late seventeenth century, drawing on the works of Molina, one of the Spanish Scholastics.

¹³ See 5.3 below.

¹⁴ See 5.4 below.

A primary focus of debate in European contract law has been the concept of good faith. Whereas civilian legal systems tend to impose obligations on contracting parties to act in good faith, traditionally, Scots and English law do not. This is not to say that contracting parties in the UK are free from standards of fairness. Rather, in those countries different concepts perform the same function. The Scottish equivalents include misrepresentation, fraud, facility and circumvention (rules applying where a weaker party has been subject to undue pressure), force and fear (rules applying where a person's will has been overborne in order to force him or her to conclude a contract) and personal bar (the Scottish equivalent of the English estoppel, which prevents a party from acting inconsistently to the detriment of another.)

There has, over the last decade, been a significant change in attitude towards good faith in Scotland. A Scottish concept of contractual good faith has emerged, identified in particular by Lord Clyde in the landmark House of Lords case, *Smith v Bank of Scotland*.¹⁵ An extensive body of scholarship on the Scots concept now exists.¹⁶ Anecdotal evidence suggests that it is relatively common for Scots contracting parties to impose obligations to act in good faith on one another, particularly in the construction context. The concept has also become part of Scots law as a result of implementation of European directives.¹⁷ These recent developments ought not to be over-emphasised: Scots law does not as yet contain an over-arching concept of good faith similar to that which is present in the civilian systems. Lord Hope, in a recent House of Lords case, commented: "[G]ood faith in Scottish contract law...is generally an underlying principle of an explanatory or legitimating rather than an active or creative nature."¹⁸

Given the difference of starting position between the civilian countries on the one hand, and Scotland and England on the other, good faith was likely to be a controversial issue in the context of the DCFR. Of the several references to good faith within the DCFR, Article III - 1:103 is the most significant.¹⁹ Somewhat surprisingly, this provision is not far-reaching. It does indeed require contracting parties to act in accordance with good faith and fair dealing in performing an obligation, in exercising a right to performance, in pursuing or defending a remedy for non-performance, or in exercising a right to terminate an obligation or contractual relationship. Breach of any of these obligations does not, however, result in an independent cause of action. In other words, where contracting party A has suffered loss as a result of a breach of the duty of good faith by contracting party B, A cannot raise an action against B claiming damages to compensate his or her

¹⁵ 1997 SC (HL) 111, 1997 SLT 1061

¹⁶ See, for example, 'Good Faith' in H MacQueen and R Zimmermann, *European Contract Law*, (Edinburgh: Edinburgh University Press, 2006); and A Forte (ed), *Good Faith in Contract and Property*, (Oxford: Hart Publishing, 1999).

¹⁷ See Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) and Commercial Agents (Council Directive) Regulations 1993 (SI 1993/3053). See now DCFR II – 9:401 – 9:411 on unfair terms, commented on at **6.4** (consumer's perspective) and **7.3** (business perspective) below.

¹⁸ *R v Immigration Officer at Prague Airport, ex parte European Roma Rights Centre* [2004] UKHL 55, [2005] WLR 1, para 60. Lord Hope is one of the Scottish Law Lords in the House of Lords.

¹⁹ Other examples include DCFR III – 1:104, which imposes a duty to co-operate. The duty is limited, applying only where this can "reasonably be expected for the performance of the debtor's obligation", although unlike III - 1:103, III – 1:104 can be enforced using normal contractual remedies. See also DCFR II – 1:102(1), Party autonomy.

loss. The effect of breach is, rather, to apply a personal bar. B is precluded from exercising or relying on a right, remedy or defence which he would otherwise have. In the DCFR, good faith is a shield rather than a means of attack.

The end result is, it is suggested, welcome, posing no significant problems for Scots law. It is, of course, appropriate to subject parties, whether businesses or consumers, to standards of fairness and reasonableness in negotiating and performing their contracts. Nevertheless, many UK academics oppose a general duty because of its potential to undermine certainty. Contracting parties may find it difficult to predict a court's view of what amounts to acting in good faith. Where certainty is undermined, the primary function of contracts could be threatened, i.e. the parties' ability to enter a contract in order to insulate themselves from fluctuations in the price of goods and services for the duration of that contract. The limited concept which appears in the DCFR is likely to allay those fears and may even have been designed with the fears of UK lawyers in mind. It is therefore not Scots lawyers, but rather lawyers from civilian systems who are likely to find the DCFR concept problematic. Its "weak" nature is in stark contrast with, for example, the equivalent German concept.²⁰

The DCFR imposes a separate duty to *negotiate* in accordance with good faith and fair dealing in both business to business ("B2B") and business to consumer ("B2C") contexts.²¹ Breach of this pre-contractual duty²² does indeed result in a duty to compensate the other negotiating party's losses.²³ As argued below, this stricter obligation is justifiable in the pre-contractual sphere, even in B2B contexts.²⁴

5. THE DCFR: BENEFICIAL ASPECTS FROM A SCOTS PERSPECTIVE

5.1 Simplified and modernised terminology

Much of the terminology in Scots contract law is outdated and confusing. The DCFR offers simplified and modernised terminology. This will be of benefit to consumers and businesses alike. There will, of course, be a "lead-in" time during which Scots lawyers will struggle with new terminology. Initial difficulties are to be expected and are justified by the important goal of achieving a more coherent and transparent contract terminology. The illustrative example of Scots terminology for breach of contract is discussed in the Appendix.

5.2 Existing similarities to Scots law

As explained above, the mixed nature of Scots law means that certain Scots concepts show a high degree of similarity to those in the DCFR. Three examples are discussed in the Appendix: third party rights (*jus quaesitum tertio*); unilateral promise; and specific performance.

²⁰ See German BGB Section 242

²¹ DCFR II – 3:301(2).

²² See 6.2 below (from a consumer perspective) and 7.4 below (from a business perspective).

²³ DCFR II – 3:301(3).

²⁴ See 6.2 and 7.4 below.

5.3 Regulation of areas which are largely unregulated in Scots law

In certain areas of Scots law there are few legal rules. Prime examples are the law relating to contracts for services, for example contracts for storage or processing. The few legal rules governing this area are, in fact, implied terms, which can only be identified with any certainty following litigation. This is obviously disadvantageous to businesses and, particularly, consumers. The DCFR rules could be used as a “fall back” regime, applicable where the parties have not entered into a written contract. Further details of the DCFR provisions are provided in the Appendix.

5.4 Parts of the DCFR which resemble un-enacted recommendations of the Scottish Law Commission

There is a high degree of similarity between some of the DCFR provisions and recent (un-enacted) recommendations of the SLC. This may be evidence of a consistency in thinking between the authors of the DCFR and Scots law reformers. The DCFR therefore constitutes a speedy route for the enactment of law reform already identified in Scotland as desirable. The actual similarities are expanded upon in the Appendix.

6. THE DCFR FROM A CONSUMER’S PERSPECTIVE

In comparison to Scots law, the DCFR offers significantly greater protection to consumers. It has consolidated the protections currently available to consumers through the implementation in the UK of existing European Directives,²⁵ and has extended protections into new areas.

6.1 Terminology and standardisation of concepts

The Acquis Group has played a key role in identifying and resolving existing inconsistencies in terminology. An example is the definition of “consumer” which presently varies from Directive to Directive. Concepts, and not simply terms, are also standardised, for example the period of time within which a consumer can withdraw from a contract is now 14 days in the DCFR.²⁶ This is a significant gain for the consumer.

6.2 Marketing and pre-contractual duties

The DCFR imposes duties on businesses in relation to marketing and the pre-contractual stage of negotiations.²⁷ The protections fall into four headings: information duties; duty to prevent input errors; negotiation and confidentiality duties; and unsolicited goods or

²⁵ Existing Directives of a consumer protection nature are listed below (implemented in the UK by regulations):

- (a) Directive 1993/EEC on Unfair Terms in Consumer Contracts (1993 OJ No L95, 21.4.93, p.29);
- (b) Directive 1997/7/EC on Distance Selling (1997 OJ No L144, 4.6.97, p.19);
- (c) Directive 1999/44/EC on Sale of Consumer Goods and Associated Guarantees (1999 OJ No L171, 7.7.1999 p.12);
- (d) Directive 2000/31/EC on Electronic Commerce (2000 O.J. L178, 17.7.2000, p.1);
- (e) Directive 2005/29/EC on Unfair Business to Consumer Commercial Practices (2005 OJ No L 149, 11.6.2005, p.22).

²⁶ DCFR II – 5:103

²⁷ DCFR Book II, Chapter 3

services. The first of these, “information duties” deserve specific comment.²⁸ A general duty applies in both B2B and B2C contexts. Businesses are required, *inter alia*, to disclose such information concerning the goods or services to be supplied as the other person can reasonably expect, taking into account the standards of quality and performance which would be normal in the circumstances.²⁹ Although buyers of goods and recipients of services in the UK are already extensively protected by statutory implied terms,³⁰ none of these currently extends as far as this general information duty.

Other information duties apply in B2C but not B2B contexts.³¹ These provisions largely replicate existing protections available to consumers in Scotland through particular EC Directives,³² although, in the DCFR, the protections are modified and extended in relatively minor respects. A principal focus is ensuring that consumers buying goods or services from a distance (most probably over the internet) are protected.³³ The consolidation of these consumer protection measures is useful, although the DCFR provisions can be criticised for failing to delineate clearly which duties apply in B2B contexts and which in B2C contexts. Details of the actual duties are included in the Appendix.

This same chapter imposes a general, non-excludable duty to negotiate in accordance with good faith and fair dealing.³⁴ Breach of this duty leads to an obligation to compensate the losses of the other party to the negotiations.³⁵ Scots and English law differ from the general European trend by failing to apply standards of good faith in the pre-contractual sphere.³⁶ Sharp practices do indeed occur, such as entering into or continuing negotiations with no intention of reaching agreement, often to exclude unfairly a competitor.³⁷ Despite being an innovation on Scots law, the provisions are welcome, although more likely to be relevant in a B2B than a B2C context.

6.3 Non-discrimination

The DCFR contains rules on non-discrimination which have no equivalent in Scots law.³⁸ The provisions are comprehensive and balanced and would be highly beneficial to consumers. Details of the provisions are included in the Appendix.

²⁸ DCFR II – 3:101.

²⁹ DCFR II – 3:301(1). See also DCFR II – 3:105 which applies in both B2B and B2C contexts.

³⁰ For sale of goods see Sale of Goods Act 1979 s12-14; and for similar protections in relation to certain service contracts see the Supply of Goods (Implied Terms) Act 1973 and the Supply of Goods and Services Act 1982, extended to Scotland by the Sale and Supply of Goods Act 1994.

³¹ DCFR II – 3:102

³² Principally Directives (b), (d) and (e) in the list in footnote 25 above.

³³ DCFR II – 3:102; 3:103 and 3:104.

³⁴ DCFR II – 3:301(2)

³⁵ DCFR II – 3:301(3)

³⁶ Although “lock-out” clauses, which bind party A to negotiate only with party B for a certain period of time, are enforceable in Scots law provided that they are subject to a specific time-limit, see *McCall’s Entertainments (Ayr) Limited v South Ayrshire Council* (No 1) 1998 SLT 1403.

³⁷ Specifically referred to in DCFR II – 3:301(4)

³⁸ DCFR II – 2:101. The Scottish litigant would be unlikely to have an alternative remedy under Article 14 of the Convention on Human Rights. It would not protect contracting party A against discrimination by contracting party B, where B has discriminated against A by refusing to contract with A.

6.4 Unfair terms

The Study Group and the Acquis Group were unable to reach agreement on whether the controls on unfair terms should extend only to standard terms or additionally to situations in which terms have been individually negotiated.³⁹ Clearly the latter, more-expansive approach would be more beneficial to consumers, protecting them even where they have negotiated the term in question.

7. THE DCFR FROM A BUSINESS PERSPECTIVE

7.1 The over-regulatory nature of the DCFR

Some might argue that the regimes offered by the DCFR are over-regulatory. A prime example is the extensive rules on information duties.⁴⁰

7.2 New terminology and structure

Businesses will indeed benefit from standardisation of concepts and structure. Mistakes of the past can be avoided. One such example was the failure in the Commercial Agents Directive to define the term “damage,” used to describe the commercial agent’s compensatable loss on termination.⁴¹ This omission led to confusion in the Scots and English courts over whether the concept within the Directive was the equivalent of common law damages for breach of contract.⁴² In the future, this confusion would not occur, the terms “damage” and “damages” being defined in the DCFR.⁴³

These gains aside, a Scots lawyer will find the DCFR initially difficult to “navigate.” This is principally because of the fundamental distinction made in the DCFR between the contract concluded by the parties and the relationship which arises out of that contract. This distinction, which is not adopted in Scots law, explains the division between Book II “Contracts and other juridical acts” and Book III “Obligations and corresponding rights.” Thus, Books II and III of the DCFR are divided according to a rationale which is completely unknown in Scots law. It is this significant issue which makes the structure of the DCFR unfamiliar to Scots lawyers. Academically, the distinction is accurate. Whether it is worth making given the practical difficulties it may cause is debatable.

7.3 Unfair terms

The Study Group and the Acquis Group were unable to reach agreement on whether the controls on unfair terms should apply only to standard (non-negotiated) terms or additionally to situations in which terms have been individually negotiated.⁴⁴ The latter more expansive approach is, it is suggested, unacceptable in a B2B context. Negotiated terms in contracts between businesses should not be subject to any fairness test (save for existing and justified controls on exclusion or limitation clauses). A similarly expansive

³⁹ See 2.2 above, and DCFR II – 9:404.

⁴⁰ See 6.2 and 7.4 below.

⁴¹ Directive 1986/653 on self-employed commercial agents (1986 OJ L382, 31.12.86, p 17).

⁴² The issue was finally resolved by the House of Lords in *Lonsdale v Howard & Hallam* [2007] UKHL 32, [2007] 1 WLR 2055.

⁴³ DCFR III – 3:701: Right to damages and definitions.

⁴⁴ See 2.2 above, and DCFR II – 9:404

approach was, following consultation, recently rejected by the Law Commission and the SLC as part of their consultation on Unfair Terms in Contracts, even where its introduction would have protected small businesses.⁴⁵

7.4 Marketing and Pre-contractual duties

Most of the information duties apply only in B2C, not B2B situations (see **6.2** above). However, the general duty to disclose information about goods and services applies in B2B situations. The information to be supplied here is assessed by reference to the standard of “good commercial practice.”⁴⁶ Because there is no tradition in Scotland of providing such information, this standard may be difficult to apply. One might also question the need to regulate B2B in addition to B2C situations. Compliance will involve increased costs and possible uncertainty.

As indicated at **6.2** above, the pre-contractual duties to negotiate in accordance with good faith and fair dealing within the DCFR are balanced, and welcome in a B2B situation.

7.5 The grant to the courts of power to amend contract terms

Very rarely in Scots contract law can a court amend the terms of a contract. Traditionally, this is considered an unacceptable infringement of the autonomy of the contracting parties. Nevertheless, certain parts of the DCFR grant such powers to the court. Because of the tendency such powers have to undermine certainty, by undermining the reliance businesses place on the actual terms of a contract, such powers tend to be unpopular with businesses. The powers can be justified only if they are balanced and exercised sparingly. The DCFR provisions are indeed balanced, and show a high degree of similarity to recent recommendations of the SLC. Experience with the isolated example of such a power which currently exists in Scots law suggests that the courts will not over-use such powers.⁴⁷ In conclusion, therefore, whilst these provisions are an innovation on Scots law, the powers themselves are limited and probably therefore acceptable to Scottish businesses. The actual provisions are discussed in the Appendix.

7.6 Interpretation of contracts

The DCFR provisions on interpretation of contracts are more extensive than the equivalent parts of Scots law in allowing a court to consider a wider class of evidence in order to interpret the contract.⁴⁸ An approach similar to the one adopted by the DCFR was rejected in an SLC recommendation from 1997⁴⁹ and in recent House of Lords

⁴⁵ Law Com No 292, Scot Law Com No 199. See Unfair Contract Terms Bill, Part 3, Non-consumer contracts, clauses 9 and 11. This, broadly, replicates the terms of the existing Unfair Contract Terms Act 1977, s17, which applies a fair and reasonableness test only to standard form contracts.

⁴⁶ DCFR II – 3:101(2)

⁴⁷ A court currently has the power to reopen an “extortionate credit bargain” under s.138 of the Consumer Credit Act 1974. There seems to be no single example of a Scottish court using this power. Experience from other legal systems suggests that powers to amend are used rarely, see, the German civil code, BGB 313, or the Louisiana Civil Code, article 1877.

⁴⁸ DCFR II – 8:102(1)(a) and (b).

⁴⁹ Scottish Law Commission Report on Interpretation in Private Law, (Scot Law Com No 160), p.52, Private Law (Interpretation) (Scotland) Bill, Schedule, clause 1(2)(b) and (c).

cases.⁵⁰ Nor will businesses favour such wider powers because of their tendency to undermine the ability of contracting parties to rely on written contract terms. Details of the actual difference between Scots and English law on the one hand and the DCFR on the other are contained in the Appendix.

8. Disclaimer

This report has been prepared by the Author in response to instructions received from the Addressee. It is confined solely to the law of Scotland and is solely for the benefit of the Addressee. It may not be relied upon by any other person or party for any purpose. The author disclaims liability to any third party to whom this report is disclosed.

⁵⁰ Most notably by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-3

APPENDIX

This Appendix contains both evidence to support the conclusions made in the report and the detail of certain DCFR provisions. The numbering used is the same as that used in the report.

5. THE DCFR: BENEFICIAL ASPECTS FROM A SCOTS PERSPECTIVE

5.1 Simplified and Modernised Terminology

Existing Scots breach of contract terminology is opaque and in need of modernisation. Many of the relevant terms begin with the letter ‘r’. The party in breach who indicates through his conduct that he or she no longer intends to be bound by the contract “repudiates” the contract. Repudiation by party A gives rise to innocent party B’s right to “rescind.” Another term, “resile” is used to describe the right of a contracting party to withdraw from a contract, for example, where the contract was conditional and that condition has not been purified. All three terms: repudiate, rescind, and resile, are often confused.

The equivalent terminology used in the DCFR is preferable. A material breach on the part of one contracting party is described as “fundamental non-performance.”⁵¹ The innocent party, faced with fundamental non-performance, has the right to “terminate” the contract.⁵² There is no specific equivalent of “resile,” and perhaps a non-technical term such as “withdraw” might be used. These terms are more transparent than the Scottish equivalents.

Latin terms are also used in Scots law and often misunderstood. An example is the name given to the Scots concept of third party rights in contract: *jus quaesitum tertio*. Another example is the term used to describe the situation where one party steps in to administer the affairs of another without authority of the absent person: *negotiorum gestio*. The equivalent terms in the DCFR: stipulation in favour of a third party⁵³ and benevolent intervention in another’s affairs, are highly preferable.⁵⁴

5.2 Concepts which show a high degree of similarity to Scots law

5.2.1 Third party right/*jus quaesitum tertio*

The DCFR stipulation in favour of a third party is similar to, but more extensive than, the Scots *jus quaesitum tertio*, (“JQT”).⁵⁵ As is the case in Scots law, under the DCFR contracting parties can confer a benefit on a third party who is not yet in existence, such as an unborn child or an unincorporated company. This aspect can be practically useful.

⁵¹ DCFR III – 3:502(2).

⁵² DCFR III – 3:502.

⁵³ DCFR II – 9:301

⁵⁴ DCFR Book V.

⁵⁵ DCFR II – 9:302.

Whereas parts of JQT are subject to doubt, equivalent aspects of the DCFR are clear. An example is the ability of a third party to make use of a limitation or exclusion clause. A third party has access to such a benefit under the DCFR,⁵⁶ whereas Scots law on this point is unclear. The DCFR provisions are beneficial: protections offered by exclusion or limitation clauses can be extended to parties other than the contracting parties. This is useful particularly in business contexts involving multiple actors, such as construction situations.

Another defect of Scots law not found in the DCFR relates to the legal basis of the third party right. In Scots law the relationship between JQT and promise is unclear, and has led to difficulties in identifying remedies available to the third party. The DCFR is clear on this point: the third party has the same rights and remedies as though he were the addressee of a unilateral promise.⁵⁷ He therefore has access to specific implement or an action for damages for breach.⁵⁸ In Scots law the third party's right to claim damages is subject to doubt.⁵⁹

One fundamental flaw of JQT is not present in the DCFR. The Scottish third party must prove that his right has been made irrevocable before that right is properly constituted. Arguably, this particular aspect makes JQT unpopular in Scotland, and has led to its infrequent use in practice. The version contained in the DCFR has no such requirement.

Whereas the DCFR contains a mechanism for rejection by the third party of the benefit,⁶⁰ Scots law contains no such mechanism. The DCFR formulation is preferable in this respect, leading to greater certainty.

5.2.2 Unilateral Promise

Both the DCFR and Scots law, in contrast to English law, contain an enforceable unilateral promise. The formulations under the DCFR and Scots law are similar: the promise or undertaking is binding on the party giving it if it is intended to be legally binding without acceptance.⁶¹ In both Scots law and in the DCFR the addressee of the promise may enforce the promise using specific implement/performance or claim damages for breach of the promise.

5.2.3 Specific Implement (specific performance)

The DCFR can be aligned with Scots law and with the civilian legal systems in Europe in that the innocent party's primary remedy for breach of contract is specific enforcement of the contract rather than damages. By contrast, the primary remedy in English law is damages. The version of the remedy which appears in the DCFR shows a high degree of similarity to Scots law. As is the case in most European systems, the DCFR contains

⁵⁶ DCFR II – 9:301(3).

⁵⁷ DCFR II – 9:302(a).

⁵⁸ DCFR III – 3:302 and III – 3:701.

⁵⁹ W W McBryde, *Contract Law in Scotland*, (3rd edn, 2007) para 10-24.

⁶⁰ DCFR II – 9:303.

⁶¹ DCFR II – 1:103(2). Promise is a common law concept in Scots law, referred to in Stair, *Institutions*, (I,10,4), first published in 1681.

categories in which specific performance is not available. These categories are not markedly different from those existing in Scots law.

5.3 Regulation of areas which are largely unregulated in Scots law

The DCFR contains both general rules on services and specific rules applicable to specific types of service contracts, namely construction; processing; storage; design; information and advice; and treatment.⁶²

The DCFR rules on services are likely to be of greatest use to consumers and small businesses.⁶³ Large businesses in Scotland are unlikely to abandon the existing standard forms, negotiated and concluded through solicitors. Thus, the role of the DCFR rules may be in providing a “fall-back” regime.

Of particular interest to consumers are the rules within the DCFR on processing and storage.⁶⁴ The definition of “processing” would include, for example, items left with a repairer or photographs left with a developer.⁶⁵ “Storage” would include storage of household goods in “lock-ups” or cars left in a secure parking areas whilst owners are on holiday.⁶⁶ These contracts are commonly entered into by consumers, and yet they are almost unregulated. Important issues, such as the duty of skill and care owed by the business are subject to doubt. This issue is clarified in the DCFR.⁶⁷

Although, on the whole, the regimes governing services contracts in the DCFR are attractive, certain factors require further consideration. The rules encourage communication of information between the parties. The duties are extensive, for example, the service provider is under both pre-contractual and contractual duties to warn the client if the service provider becomes aware of a risk that the service requested may not achieve the result stated or envisaged by the client.⁶⁸ Such duties to warn, not currently part of Scots law, might prove unpopular with businesses because of their tendency to increase time and transaction costs. Chapter 7 on Information and advice would impact upon professionals such as solicitors and estate agents. This chapter would require to be carefully scrutinised to check that its terms are consistent with existing professional codes of conduct.

5.4 Parts of the DCFR which resemble un-enacted recommendations of the SLC

Scots law contains an anomaly as a result of the case, *White & Carter Councils v McGregor*.⁶⁹ Where contracting party A indicates, shortly after formation of the contract, that he no longer requires performance by B, B is nevertheless entitled to continue to perform. This is, of course, economically wasteful. Under the DCFR, party B would not

⁶² DCFR IV C, the general provisions in Chapters 1 and 2, and rules applying to specific contracts in Chapters 3 to 8.

⁶³ DCFR IV C

⁶⁴ DCFR IV C Chapter 4: Processing and Chapter 5: Storage.

⁶⁵ DCFR IV C – 4:101.

⁶⁶ DCFR IV C – 5:101.

⁶⁷ DCFR IV.C. – 2:105.

⁶⁸ DCFR IV.C. – 2:102 and IV.C. – 2:108.

⁶⁹ 1962 SC (HL) 1; 1962 SLT 9; [1962] AC 413.

be entitled to perform if he could have made a reasonable substitute transaction or if performance would be unreasonable in the circumstances.⁷⁰ This provision is almost identical to the recommendation (and concomitant clause of the bill) contained in the SLC Report on Remedies for Breach of Contract,⁷¹ published in 1999.

Another example lies in the field of penalty clauses. Contracts commonly include liquidate damages clauses, in terms of which a specific sum is payable on breach whether or not that sum is greater or less than the actual loss suffered. These clauses are only enforceable in Scots law if they represent a genuine pre-estimate of loss. If they are not, they are classed as a penalty, and are unenforceable. Currently in Scots law, there is no mechanism which would allow a court to reduce an excessive penalty to an acceptable level. The DCFR gives to the court such a power where the penalty is “grossly excessive.”⁷² This power is welcome because it allows the court more closely to reflect the intentions of the parties. It is better to apply a penalty rather than no penalty at all.

There is a high degree of similarity between the terms of the DCFR on penalty clauses and the recommendation (and concomitant clause of the bill) contained in the SLC Report on Penalty Clauses,⁷³ published in 1999. Under the SLC recommendation the court would be entitled to amend the penalty where it is “manifestly excessive.”⁷⁴ Under the DCFR equivalent provision, the court can amend the penalty where it is “grossly excessive”. As a weaker formulation of an SLC recommendation, the terms of the DCFR are likely to be acceptable from a Scots perspective.

⁷⁰ DCFR III – 3:301.

⁷¹ Scot Law Com No 174, page 39 and clause 1 of the Contract (Scotland) Bill, page 42.

⁷² DCFR III – 3:710(2).

⁷³ Scot Law Com No 171, pp. 28-29 and clause 4 of the Penalty Clauses (Scotland) Bill, p 31. Indeed, clause 4 of the Scottish bill goes further, by allowing the court to amend the penalty where it is “manifestly excessive”, whereas the DCFR applies the higher test of “grossly excessive.”

⁷⁴ See clause 4 of the Penalty Clauses (Scotland) Bill, p31, Scot Law Com No 171.

6. THE DCFR FROM THE PERSPECTIVE OF THE CONSUMER

6.2 Marketing and pre-contractual duties

The Marketing and pre-contractual duties fall into four headings: information duties; duty to prevent input errors; negotiation and confidentiality duties; and unsolicited goods and services.⁷⁵

Duties are imposed in B2B and B2C situations in relation to formation by electronic means.⁷⁶ Businesses must provide information about the technical steps which must be followed in order to conclude the contract; whether or not a contract document will be filed by the business and whether it will be accessible; the technical means for identifying and correcting input errors before the other party makes or accepts an offer; the languages offered for the conclusion of the contract; and any contract terms used.⁷⁷

The information duties in the DCFR applicable only in B2C contexts (see 6.2 above) apply where the business is marketing goods or services to consumers,⁷⁸ where the consumer is at a disadvantage, because of the technical medium used, physical distance between business and consumer or nature of the transaction,⁷⁹ and where the business initiates direct and immediate distance communication.⁸⁰

The extent of the information to be provided by a business in a B2C situation where the contract is concluded at a distance is extensive, including information about the main characteristics of the goods or services, the price including delivery charge, taxes and other costs, the address and identity of the business with which the consumer is transacting, the terms of the contract, the rights and obligations of both contracting parties, and any available redress procedures, as may be appropriate in the particular case.⁸¹ All such information must be confirmed in textual form on a durable medium.⁸² This constitutes a significant administrative burden for businesses.

6.3 Non-discrimination

The DCFR provisions on non-discrimination are comprehensive, extending to harassment, including conduct of a sexual nature.⁸³ They are also balanced, discrimination being potentially justified by a legitimate aim.⁸⁴ The victim also benefits from a reversed burden of proof, the party who has allegedly committed the discrimination being obliged to prove that no discrimination has occurred.⁸⁵

⁷⁵ DCFR Book II Chapter 3

⁷⁶ DCFR II – 3:105.

⁷⁷ DCFR II – 3:105.

⁷⁸ DCFR II – 3:102.

⁷⁹ DCFR II – 3:103.

⁸⁰ DCFR II – 3:104.

⁸¹ DCFR II – 3:106(3)

⁸² DCFR II – 3:106. “Durable medium” is defined as “any material on which information is stored so that it is accessible for future reference for a period of time adequate to the purposes of the information, and which allows the unchanged reproduction of this information.”

⁸³ DCFR II – 2:102(2).

⁸⁴ DCFR II – 2:103.

⁸⁵ DCFR II – 2:105(1).

7. THE DCFR FROM THE PERSPECTIVE OF BUSINESSES

7.4 Marketing and pre-contractual duties

Details of the content of these duties are provided at **6.2** above.

7.5 The grant to the courts of powers to amend contract terms

The DCFR gives to the court power to amend contract terms in cases of change of circumstances, or what is known in Scots law as frustration of contract. In terms of this principle, where a contract is so fundamentally affected by unexpected circumstances that it no longer constitutes, in practical effect, the contract the parties concluded, those parties can be released from their contractual obligations. The point at which the parties are released may be arbitrary (triggered, for example, by war or civil unrest). The parties may be left in an unfair situation, e.g. one party having paid part of the price but having received nothing in return. The powers currently available to a Scottish court in this situation are so limited that they are, arguably, ineffectual.⁸⁶ The court is limited to ordering the return of benefits from one party to the other. Where party A has carried out services which have resulted in no transfer of a tangible benefit to party B, A has no remedy. The parties are left in an inequitable situation.

The DCFR provisions allow a court to vary the contract to make it reasonable and equitable in the new circumstances⁸⁷ and to terminate the obligation at a date and on terms to be determined by the court.⁸⁸ The powers are limited: the change of circumstances must be “exceptional” and the power to vary may only be utilised where it would be “manifestly unjust” to hold that party to the contract.⁸⁹ The solution is a balanced one, which causes no significant concerns to Scots lawyers.

Other provisions in the DCFR allow the courts to vary the price under a contract.⁹⁰ Certain of the powers are uncontroversial, for example, where a third party originally appointed by the contract to determine the price either cannot or will not do so,⁹¹ or where the price was to be determined by reference to an external factor which no longer exists.⁹² More controversial powers enable a court to set a reasonable price or substitute a reasonable price for a grossly unreasonable price.⁹³ This differs little from the, as yet unused, power of Scots courts to reopen extortionate credit bargains.⁹⁴ In conclusion therefore, the DCFR provisions are acceptable to Scots lawyers.

7.6 Rules on Interpretation of Contracts

Over the course of the last twenty years, the rules on interpretation of contract have developed significantly, largely as a result of ground-breaking speeches of Lord

⁸⁶ As is argued in H MacQueen and J Thomson, *Contract Law in Scotland*, (2nd edn, 2007), para 4.85.

⁸⁷ DCFR III – 1:110(2)(a).

⁸⁸ DCFR III – 1:110(2)(b).

⁸⁹ DCFR III – 1:110(2).

⁹⁰ See DCFR II – 9:104 – 9:107.

⁹¹ DCFR II – 9:106.

⁹² DCFR II – 9:107.

⁹³ DCFR II – 9:104; II – 9:105; II – 9:106(2); II – 9:107.

⁹⁴ Under s.138 of the Consumer Credit Act 1974.

Hoffmann in the House of Lords.⁹⁵ Despite these developments, Scots and English law remain out-of-step with the rest of Europe. Both systems exclude reference to the parties' negotiations prior to conclusion of the contract and the parties' conduct after conclusion of the contract as part of the court's interpretative process. Both types of evidence are admissible under the DCFR.⁹⁶

⁹⁵ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896.

⁹⁶ II – 8:102(1)(a) and (b) and II – 4:104 on merger clauses.